

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALCLIFORD LAMAR WINFREY,

Defendant-Appellant.

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UNPUBLISHED

March 3, 2005

No. 250247

Wayne Circuit Court

LC No. 02-011196-01

Before: Talbot, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felon in possession of a firearm, MCL 750.224f, possession of a short-barreled rifle, MCL 750.224b, and possession of a firearm during the commission of a felony, MCL 750.227b. He received a four-day suspended sentence for the felon in possession and possession of a short-barreled rifle convictions, and a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant's convictions arise from an incident on Harlow Street in Detroit at approximately 2:55 a.m. on July 27, 2002, in which Detroit Police Officer Robert Nill shot defendant. Officer Nill testified at trial that he heard gunshots coming from Harlow Street and went to investigate. When he and his partner, both in full uniform, arrived at the scene, he saw defendant and two other men. According to Officer Nill, defendant was holding a "long gun" (i.e., a short-barreled rifle) in his left hand, at his side and in front of him. When Officer Nill ordered him to drop the gun, defendant turned toward Nill and extended the weapon in the officer's direction. Officer Nill fired his service pistol one time and struck defendant in the arm.

Ballistics testing showed that casings found at the scene were fired from the short-barreled rifle allegedly possessed by defendant. Gunshot residue testing showed that defendant had gunshot residue on his face, but not his hands, a few hours after the shooting. Defendant contended at trial that another man was in possession of the short-barreled rifle, and that Officer Nill fabricated his account to cover up evidence that, in haste, he shot an unarmed citizen. Two defense witnesses testified that defendant was not holding a gun during the incident.

## I

Defendant first argues that the trial court erred in excluding medical evidence that would have supported his defense theory. Defendant preserved this issue by making a timely offer of proof. MRE 103(a)(2); *People v Stacy*, 193 Mich App 19, 31; 484 NW2d 675 (1992).

Defendant was originally charged with felonious assault, MCL 750.82, in addition to the weapons charges. The prosecutor dismissed this charge because forensic experts for both parties agreed that Officer Nill's bullet entered the back of defendant's arm, suggesting that defendant was facing away from Nill when he was shot. At trial, although self-defense was no longer an issue, defendant wanted to use this forensic evidence to impeach Officer Nill's testimony and, further, to support his claim that Officer Nill shot him without justification and was, thus, motivated to fabricate allegations that defendant was armed. The trial court, however, held that the evidence was relevant only to the dismissed felonious assault charge, and because the only remaining charges against defendant involved his possession of a firearm, the medical evidence bore no relevance to whether defendant was or was not armed. The trial court, therefore, excluded the evidence, but held that questions challenging Officer Nill's knowledge and motive to fabricate were proper.

Defendant now argues that the exclusion of this evidence deprived him of various constitutional rights, including the right to a fair trial, to due process, to present a substantial defense, and to confrontation. He maintains that he was further prejudiced by the exclusion of this evidence when the prosecutor argued that Officer Nill shot him because he was pointing, not merely holding, the firearm.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002). An abuse of discretion exists only if an unprejudiced person, considering the facts on which the trial court acted, would say that there is no justification or excuse for the trial court's decision. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999). The trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001). An error in the admission or exclusion of evidence is not ground for reversal unless refusal to take this action appears inconsistent with substantial justice. MCR 2.613(A); MCL 769.26. Under this rule, reversal is required only if the error is prejudicial. *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996). The defendant claiming error must show that it is more probable than not that the alleged error affected the outcome of the trial in light of the weight and strength of the untainted evidence. *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001).

The trial court excluded the evidence on relevance grounds. Relevant evidence is evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). Generally, all relevant evidence is admissible, unless otherwise provided by law, and evidence which is not relevant is not admissible. MRE 402; *Aldrich, supra*. Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403; *Aldrich, supra*.

We conclude that the trial court did not abuse its discretion in holding that the forensic evidence was relevant only to the felonious assault charge and not to the possession charges. Neither the fact that the police officer shot defendant nor the angle at which the bullet struck him were in dispute at trial. The evidence that defendant was postured to fire a gun at Officer Nill was not necessary to prove the elements of any of the weapons offenses. See, e.g., *People v Beard*, 171 Mich App 538, 546; 431 NW2d 232 (1988) (“It is possession, not use, of a firearm during the commission of a felony that satisfies the requirements of the [felony-firearm] statute.”). The prosecution principally relied on Officer Nill’s account of the incident to prove that defendant possessed a firearm during the incident. Officer Nill’s testimony that he shot defendant because defendant turned toward him and raised a gun established the possession element of all three of the charged weapons offenses.

Here, the forensic evidence was not material to a fact of consequence to the action – possession of a gun at the time of the incident. *Manser, supra* at 32. Instead, medical evidence concerning defendant’s injury was relevant only to a collateral matter not at issue – the dismissed felonious assault charge and whether or not defendant acted in an offensive or threatening manner. Thus, the trial court did not abuse its discretion in excluding the medical evidence on the ground that it was not probative of the question whether defendant possessed a weapon.

We note that, in any event, the trial court’s ruling did not interfere with defendant’s presentation of his defense theory. At trial, defense counsel argued that defendant was not facing Officer Nill at the time he was shot and that Officer Nill’s claim of self-defense was an attempt to cover up the shooting of an unarmed man. In fact, the defense introduced photographs of defendant’s injury for the jury’s consideration. Consequently, the trial court’s ruling in no way impeded or interfered with defendant’s presentation of his defense theory. The forensic evidence, at best, would have been cumulative to facts that were not disputed at trial. Thus, the error, if any, in the trial court’s evidentiary ruling was not outcome determinative. *Whittaker, supra*.

## II

Defendant next argues that the trial court erred in denying his request for an in camera review of Officer Nill’s personnel file. Defendant preserved this issue by moving for an in camera review of the personnel file for information showing that Officer Nill had previously engaged in violent or assaultive behavior. He argued that this information was relevant to Officer Nill’s conduct during the encounter with defendant. The trial court denied the request.

We review a trial court’s ruling on a discovery motion for an abuse of discretion. *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003). The trial court also has discretion to conduct an in camera review to determine whether records contain discoverable materials. *People v Laws*, 218 Mich App 447, 455; 554 NW2d 586 (1996). Discovery should be granted where the information sought is necessary to a fair trial and a proper preparation of a defense. *Id.* at 452. Even inadmissible evidence is discoverable if it will aid the defendant in trial preparation. *Id.* A defendant has a due process right to obtain evidence in the possession of the prosecutor if it is favorable to the accused and material to guilt or innocence. *Id.*, citing *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994). However, “[i]n general, when a discovery request is made disclosure should not occur when the record reflects that the party seeking disclosure is on ‘a fishing expedition to see what may turn up.’” *Stanaway, supra* at

680, quoting *Bowman Dairy Co v United States*, 341 US 214, 221; 71 S Ct 675; 95 L Ed 2d 879 (1951). “The burden of showing the trial court facts indicating that such information is necessary to a preparation of its defense and in the interests of a fair trial, and not simply a part of a fishing expedition, rests upon the moving party.” *Id.*, quoting *People v Maranian*, 359 Mich 361, 368; 102 NW2d 568 (1960).<sup>1</sup>

We conclude that the trial court did not abuse its discretion in declining to review Officer Nill’s personnel file in camera for the purpose of determining whether Officer Nill had previously used excessive force against a citizen. We agree with the prosecution that defendant failed to show any factual support for his claim that Officer Nill’s personnel file might contain helpful information, and his attempt to access the records “was nothing more than a fishing expedition.” Defendant suggested that a review of the records might reveal the possibility of misconduct, but he failed to provide any factual support for his contention. Because defendant’s argument was based on mere speculation, the trial court correctly ruled that a review of the personnel file was not warranted and irrelevant for trial. In sum, the court did not abuse its discretion in denying defendant’s request for in camera review of Officer Nill’s personnel file.<sup>2</sup>

### III

Finally, defendant claims that the trial court erroneously instructed the jurors to deliberate with each other and share their opinions. Defendant objects to the following statement:

I don’t care [how] you do it [deliberate]. If you go around the table. Go by height, age, or other qualifications. Everybody needs a chance to express their opinion. Just because the verdict has to be unanimous doesn’t mean – which means of course that you all have to agree, because before you can return a verdict of guilty, that I want you to give up your own individual thoughts just for the sake of reaching a verdict. If somebody’s opinion makes more sense [sic], by all means change your mind. But not just for the sake of reaching a unanimous verdict.

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<sup>1</sup> Although the prosecution cites MCR 6.201(C)(2) for the proposition that defendant must demonstrate “a good-faith belief, grounded in articulable fact, that there is a reasonable probability” that the file contained information material to the defense, this court rule applies to records protected by privilege. The prosecution does not cite any authority indicating that a police officer’s personnel file is “protected from disclosure by constitution, statute, or privilege.” MCR 6.201(C)(1). While law enforcement personnel records are exempt from disclosure under the Freedom of Information Act, MCL 15.243(1)(s)(ix), that statute does not govern discovery in a criminal action.

<sup>2</sup> Because we resolve this as a discovery issue, we need not address defendant’s claim that the prosecutor violated his constitutional due process rights under *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). See *People v Riley*, 465 Mich 442, 447; 636 NW2d 514 (2001) (a court should avoid reaching a constitutional issue that is not necessary to resolve a case).

Defendant argues that this instruction was coercive and led the jurors to believe that they had to reach a guilty verdict. However, defendant expressed satisfaction with the court's jury instructions, so he not only forfeited, but waived, any claim of error. See *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000), wherein our Supreme Court held that a defense counsel's express approval of the trial court's jury instruction, as opposed to a mere failure to object, "constitutes a waiver that *extinguishes* any error" (emphasis in original).

Affirmed.

/s/ Michael J. Talbot  
/s/ Richard Allen Griffin  
/s/ Kurtis T. Wilder